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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES DANIEL SOPER,

Defendant and Appellant.

D047875

(Super. Ct. No. SCN193073)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed.

I.

INTRODUCTION

In the first portion of a bifurcated trial, a jury found James Daniel Soper guilty of both the second degree murder of James Olson (Pen. Code, § 187)¹ (count 1) and the first

¹ Unless otherwise specified, all subsequent statutory references are to the Penal Code.

degree murder of George Rigby (§ 187) (count 2). The jury also found, with respect to each count, that Soper personally used a deadly weapon in the commission of the murders, within the meaning of sections 12022, subdivision (b)(1) and 1192.7, subdivision (c)(23). In the second portion of the trial, the jury found that Soper had served four prior prison terms and that he had suffered one prior strike conviction within the meaning of section 667, subdivisions (b-i). The trial court sentenced Soper to a total term of 86 years to life in prison.

Soper filed an appeal in which he claimed that the trial court erred in denying his motion to sever trial of the two murder charges. In addition, Soper claimed that the trial court erred in failing to instruct the jury regarding involuntary manslaughter, admitting evidence of his pretrial assault on a witness, and in instructing the jury pursuant to CALJIC No. 2.06 regarding that assault, and instructing the jury pursuant to CALJIC No. 2.52 regarding flight as reflecting consciousness of guilt. Soper also claimed that the trial court improperly denied his postverdict application to disclose the names, addresses and telephone numbers of the jurors.

In our initial opinion in this matter, we concluded that the trial court erred in denying Soper's motion to sever. (*People v. Soper* (Apr. 10, 2007, D047875) [nonpub. opn.], slip opn. at p. 2.) We further concluded that the error required reversal of the judgment and retrial with respect to both murders. (*Ibid.*) Accordingly, we reversed the judgment in its entirety. (*Ibid.*) We did not address Soper's claim regarding his postverdict application to disclose juror information, since that issue was not likely to

recur on remand. (*Ibid.*) However, we considered and rejected Soper's other claims as issues likely to recur on remand. (*Id.* at slip opn. at pp. 27-51.)

The Supreme Court granted the People's petition for review (*People v. Soper*, review granted June 27, 2007, S152667), and reversed this court's judgment, concluding that the trial court had not erred in denying Soper's motion to sever and that joinder of the two trials did not deny Soper his right to due process of law. (*People v. Soper* (2009) 45 Cal.4th 759, 783-784.) The Supreme Court remanded the matter to this court for proceedings consistent with its opinion. (*Id.* at p. 784.)

On remand, we consider the only issue Soper raised in his appeal that we did not address in our prior opinion, namely, whether the trial court erred in denying Soper's postverdict application to disclose personal juror identifying information.² Soper's application was based on a local newspaper article that stated that the foreman of Soper's jury had indicated that the jury had found Soper guilty of second degree murder in the Olson case, and not first degree murder, because there was less physical evidence as to the Olson murder than there was as to the Rigby murder. On appeal, Soper claims that in view of the evidence that was presented at trial as to the two murders, "it is inexplicable,

² For the reasons stated in our initial opinion in this matter, we reject Soper's claims that the trial court erred in failing to instruct the jury regarding involuntary manslaughter, admitting evidence of Soper's assault on a witness, instructing the jury pursuant to CALJIC No. 2.06, and in instructing the jury pursuant to CALJIC No. 2.52 regarding flight. (*People v. Soper, supra*, D047875, slip opn. at pp. 27-51.) The Supreme Court did not address these issues in its opinion. (See *People v. Soper, supra*, 45 Cal.4th 759.) Thus, our analysis of these issues remains valid in the wake of the Supreme Court's reversal of our prior opinion on other grounds. (See Eisenberg et al., Cal Practice Guide: Civil Appeals and Writs (The Rutter Group 2006) ¶ 13:120.1, p. 12-29 (rev # 1, 2007).)

absent some sort of impropriety in the deliberations, just how a finding of 'less physical evidence' would result in a conviction of second degree murder, as opposed to first degree murder." Soper maintains that he has established good cause for disclosure of the juror information because, given the foreman's statement, "further investigation was necessary to determine if verifiable statements (overt acts) were uttered in the jury room, and whether, perhaps, the jury improperly agreed to render a compromise verdict, to render a rubber-stamp verdict, or to ignore the court's instructions as to their obligation to follow the law as given." We reject this claim, and affirm the trial court's judgment.

II.

FACTUAL BACKGROUND

In *People v. Soper, supra*, 45 Cal.4th at pages 765-769, the Supreme Court described the factual background of this case as follows:³

A

George Rigby, who was homeless, camped on a golf course behind a Sav-On drug store in the City of Oceanside. At approximately 8:00 a.m. on Sunday, May 23, 2004, several golfers found Rigby's dead body on a piece of cardboard at his campsite.

Oceanside Police Officer Roy Monge responded to the scene. While there, a woman, Tina Torres, told Monge that a "mean guy" named "Jay Soper" frequently visited Rigby at his camp.

³ We quote the entirety of the Supreme Court's description of the factual background of the case because Soper contends that his claim that he has demonstrated a right to juror information is based on "[t]he facts of this particular case"

Among the items found around Rigby's campsite was an unopened package of crackers. Defendant's fingerprints were found on the package. Bloodstains were found on a paper bag near Rigby's body, as well as on the cardboard underneath his body, near his hip and knee. DNA testing conducted on these bloodstains matched specimens taken from defendant.

The golf course landscaping crew had used railroad ties to fashion steps. A railroad tie that weighed approximately 30 to 40 pounds was on the ground near Rigby's body. Bloodied hairs found on the railroad tie were linked to Rigby by DNA testing. Another sample from the railroad tie excluded defendant and Rigby, indicating it belonged to a third, unidentified male. Some of the bloodstains on the back of Rigby's hands also appeared to be linked to the same unidentified male.

There was a depression and a split approximately four inches in length near Rigby's left temple. Dr. Christina Stanley, a medical examiner, testified that Rigby had been killed by blunt force head injuries, and that he probably died the night before his body was found. According to the medical examiner, the lack of blood in the immediate vicinity of Rigby's body suggested he had died from a single blow. In addition, an injury to the back right side of Rigby's head indicated he had been lying down at the time of the killing. Rigby's jacket pocket was open, and no money was found on his person or in the vicinity.

Several witnesses testified they had seen defendant with Rigby at his camp on the day before Rigby's body was discovered. For example, Doris Daniel and her boyfriend Lewis Mungin saw Rigby and defendant together at Rigby's camp at approximately

midnight-about eight hours before Rigby's body was found. Jeffrey Nash testified that he and others played cards with defendant and Rigby at the camp the day before Rigby's body was found. Nash stated that defendant became upset with Rigby while playing cards, pushed Rigby, and argued with him throughout most of the game. Kenneth Whitaker testified that he shared a drink with Rigby and defendant the morning before Rigby's body was discovered.

Richard Wagner, an acquaintance of defendant's, testified that three or four months after the Rigby homicide, defendant told him that he was 'on the run' because the police were looking for him.

B

On Thursday, September 16, 2004, City of Carlsbad police officers discovered James Olson's decomposing body at his campsite in a drainage ditch on a hillside behind a Sav-On drug store in Carlsbad. The location was approximately two to three miles from the scene of the Rigby homicide. Olson was lying in a sleeping bag, and there was a block of concrete resting on his legs.

According to Dr. Christina Stanley, the medical examiner, Olson had suffered crushing head injuries. Police officers found defendant's fingerprint on a jar of peanuts three or four feet from Olson's body. Blood containing DNA that matched DNA samples from Olson was found on the concrete block. DNA testing also revealed that defendant could neither be identified nor excluded as the donor of other blood samples taken from the concrete block. One of Olson's pants pockets was partially turned inside-out and was empty; still, he had \$9 in his pants change pocket.

Dr. Stanley concluded that Olson had been dead for several days, and possibly for as long as a week, before his body was discovered. Dr. Stanley further concluded that Olson died from blunt force head injuries, and that it was likely these injuries were inflicted by means of the concrete block found at the scene. Brian Kennedy, a crime scene reconstruction expert, testified that in his opinion, Olson probably died from a single blow from the concrete block.

John Rogers, a transient, knew Olson for 10 years, and met defendant approximately two weeks before the discovery of Olson's death. Defendant told Rogers that his name was Richard Perry. The police investigated Rogers to determine his possible involvement in the homicide. DNA testing of blood samples taken from the concrete block excluded Rogers as a contributor. Rogers identified a pocketknife found at Olson's camp as his own, but said that defendant had stolen it from him about two weeks earlier. Neither fingerprints nor DNA were found on the knife.

Rogers explained that he had been with defendant and Olson on the Saturday evening (September 11) before Olson's body was discovered. Rogers said that the men had watched a band perform at the Coffee Bean, a local coffee shop located near Olson's camp. Rogers testified that at approximately 8:30 p.m., Olson left to purchase a beer, but soon returned to the Coffee Bean. Shortly thereafter, Olson departed for his camp. According to Rogers, as Olson was leaving, defendant told Olson that he would accompany Olson to his camp to have a beer. Rogers further testified that he saw Olson shake his head "no" in a manner indicating that Olson was frightened. Defendant

followed Olson out of the Coffee Bean, and this was the last time Rogers saw Olson alive.

On Thursday, September 16, 2004, Carlsbad Police Officer William Michalek responded to the scene of the Olson homicide and attempted to locate other homeless persons in the area who might have information concerning the matter. Michalek encountered Rogers and defendant sitting together at the coffee shop where, Rogers later testified, he had been with defendant and Olson on the previous Saturday evening. When Officer Michalek asked Rogers and defendant for their names, Rogers gave his real name and defendant told Michalek that his name was "Richard Perry." After a brief conversation, Michalek left. Later that same day, after Michalek had gathered more information about the killing, he attempted to locate Rogers and defendant. Michalek located Rogers, who accompanied him to the police station and provided an oral swab and a fingerprint. Michalek was unable to locate defendant, and informed other police officers that he would be interested in speaking with defendant.

C

On September 19, 2004, Carlsbad Police Officer Paul Reyes noticed defendant standing at a freeway off-ramp holding a sign that read, "Please help if you can. Disabled. God Bless" - activity that, Officer Reyes testified, is illegal. Officer Reyes made contact with defendant, who told Reyes that his name was "Richard Perry." Officer Reyes issued defendant a citation.

Following this encounter, defendant consented to speak with Carlsbad police detectives. In response to their questions concerning the Olson killing, defendant denied

ever having been at Olson's campsite or even knowing the victim. He also denied recognizing or ever having possessed the pocketknife that was found at Olson's camp. Eventually officers learned through a fingerprint comparison that the person claiming to be Richard Perry was in fact defendant James Daniel Soper. After determining there was an outstanding parole violation warrant for defendant, the police arrested him.

Defendant was given *Miranda* advisements (*Miranda v. Arizona* (1966) 384 U.S. 436), and agreed to speak further with detectives from the Oceanside and Carlsbad police departments. The detectives conducted several additional audiotaped and/or videotaped interviews of defendant in late September 2004.

During these interviews, defendant stated that he regularly consumed large quantities of alcohol and was being treated for alcohol withdrawal. Defendant claimed that because of his alcoholism, he had difficulty recognizing individuals by name. He also exhibited symptoms of alcohol intoxication.

With respect to the Rigby killing, defendant told the detectives that he never had been at the victim's camp. Defendant also stated to the police that he had "no clue" how his fingerprint could have been found on the wrapper at Rigby's camp, and denied visiting that site because, he explained, it was "hot" — meaning that the police often were there. Defendant made somewhat inconsistent statements concerning whether he knew Rigby, and how well he knew him. During questioning, defendant denied ever getting into a fight with "George," denied knowing him, and then admitted seeing him "around . . . a million times," although, defendant maintained, he had never been formally introduced to Rigby. After the detectives asked defendant to consider whether there was

any reason his fingerprints would be found at Rigby's camp, they left the interview room. While defendant was alone in the room, the camera and audio recorder continued to record. Defendant groaned and stated, "I'm going to throw up."

With respect to the Olson killing, the detectives showed defendant a picture of Olson and asked defendant whether he knew the name of the person depicted in the photograph. Defendant stated that he did not know the person's name. Defendant told the detectives he was familiar with the area behind the Sav-On drug store where Olson had been killed, but never had been in that area.

The prosecution introduced evidence concerning the nature of the two homicides as compared with others that had been committed in the Oceanside and Carlsbad areas. Steven Walter, an Oceanside Police Department criminal analyst, testified that no other homicide in the area during the five years preceding the Rigby and Olson matters involved the killing of a transient at his or her camp. Walter also stated that no other homicide during that period involved a "weapon of opportunity" — an object obtained by the perpetrator in the immediate vicinity of the killing; nor was any other killing perpetrated by a single fatal blow to the head. Brian Kennedy, the crime scene reconstructionist, testified that despite his having investigated several hundred prior homicides, he never had encountered a case in which a transient was killed at his or her campsite while lying down or sleeping. Kennedy further testified that most homicides accomplished by blunt force trauma involve multiple blows-as opposed to the single blows that killed Rigby and Olson-and added that he found the similarities between the two cases "striking." Finally, Dr. Stanley, the San Diego County medical examiner who

investigated both cases and conducted both autopsies, testified that she was "struck by the similarities" apparent at the respective crime scenes.

D

At trial, defendant challenged both his identity as the perpetrator and his ability to form the requisite intent to kill. In order to explain why his own blood was found at Rigby's camp, he presented evidence establishing that he suffered a serious facial wound in late April 2004, requiring surgery. Defense counsel argued that the surgery may have caused defendant's face to bleed periodically during the time in question. Ronald Marquez, a registered nurse at the Vista Detention Facility, testified that on September 19, 2004, after observing defendant exhibit symptoms consistent with alcohol withdrawal, he treated defendant at the jail with Librium, an antianxiety medication.

The jury convicted defendant of the first degree murder of Rigby and of the second degree murder of Olson.

III.

DISCUSSION

The trial court did not abuse its discretion in denying Soper's application to disclose jurors' names, addresses and telephone numbers

Soper claims that the trial court erred in denying his postverdict application to disclose jurors' names, addresses and telephone numbers. We review this claim under the abuse of discretion standard of review. (*People v. Jones* (1998) 17 Cal.4th 279, 317.)

A. *Factual and procedural background*

After the jury rendered its verdict, but prior to sentencing, defense counsel filed an application seeking a court order disclosing the names, addresses and telephone numbers of the jurors to counsel.⁴ The application stated that the information was necessary to enable defense counsel to prepare a motion for new trial based, in part, on juror misconduct.

Defense counsel supported the application with a declaration and a brief. In her declaration, defense counsel stated that it was clear that the jury "did not decide each count separately as they were instructed to do," and that, "[f]urther investigation is necessary to determine whether misconduct did occur." Defense counsel supported her allegations of potential misconduct by referring to a newspaper article that was published the day after the jury returned its verdict in this case. Counsel claimed that "the jury foreman was quoted in the North County Times as stating that because there was not that much evidence as to the Olson killing that they found Mr. Soper guilty of second degree murder."

The article in question stated in relevant part:

"The combination of Soper's blood and fingerprints at the scene of Rigby's murder was enough for the jury to convict the defendant of first-degree murder, said Juror #12, the jury foreman. [¶] The [jury] foreman, who declined to give his name also said — and other jurors

⁴ To be precise, defense counsel's application contained a request for the jurors' addresses and telephone numbers. Defense counsel also sought the jurors' names in her declaration in support of the application.

agreed — that the jury settled on second-degree murder in Olson's slaying because there was less physical evidence."⁵

The prosecutor filed a response in which he argued that the court should deny the application on a number of grounds, including that Soper had failed to establish good cause to unseal the jurors' personal identifying information. The prosecutor noted that the newspaper article on which the application was based contained "multiple levels of hearsay" and did not contain any actual quotations attributed to the juror foreman. The prosecutor also noted that defense counsel had not signed her declaration under penalty of perjury. The prosecutor further argued that the statement attributed to the jury foreman in the article — that there was "less evidence" in the Olson case — was objectively true and did not constitute evidence of misconduct.

At a hearing on the application, the trial court denied Soper's request for disclosure of the jurors' personal identifying information. The court stated that it was denying the application for the reasons stated in the prosecutor's response.

B. *The law governing disclosure of personal juror identifying information*

Code of Civil Procedure section 206, subdivision (g) provides:

"Pursuant to Section 237, a defendant or defendant's counsel may, following the recording of a jury's verdict in a criminal proceeding, petition the court for access to personal juror identifying information

⁵ Defense counsel failed to include in the application and supporting papers a copy of the newspaper article on which her declaration was primarily based. However, in his response to defense counsel's application, the prosecutor attached a copy of an article from the August 9, 2005 issue of the North County Times. The prosecutor indicated that he believed the August 9 article was the article to which defense counsel was referring. On appeal, Soper states that the August 9, 2005 article is in fact the article on which his application was based.

within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose. This information consists of jurors' names, addresses, and telephone numbers. The court shall consider all requests for personal juror identifying information pursuant to Section 237."

Code of Civil Procedure section 237 provides in relevant part:

"(a)(1) The names of qualified jurors drawn from the qualified juror list for the superior court shall be made available to the public upon request unless the court determines that a compelling interest, as defined in subdivision (b), requires that this information should be kept confidential or its use limited in whole or in part.

"(2) Upon the recording of a jury's verdict in a criminal jury proceeding, the court's record of personal juror identifying information of trial jurors, as defined in Section 194, consisting of names, addresses, and telephone numbers, shall be sealed until further order of the court as provided by this section.

"(3) For purposes of this section, 'sealed' or 'sealing' means extracting or otherwise removing the personal juror identifying information from the court record.

"(4) This subdivision applies only to cases in which a jury verdict was returned on or after January 1, 1996.

"(b) Any person may petition the court for access to these records. The petition shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information. The court shall set the matter for hearing if the petition and supporting declaration establish a prima facie showing of good cause for the release of the personal juror identifying information, but shall not set the matter for hearing if there is a showing on the record of facts that establish a compelling interest against disclosure. A compelling interest includes, but is not limited to, protecting jurors from threats or danger of physical harm. If the court does not set the matter for hearing, the court shall by minute order set forth the reasons and make express findings either of a lack of a prima facie showing of good cause or the presence of a compelling interest against disclosure."

In order to demonstrate good cause for the release of personal juror identifying information, a defendant must "set[] forth a sufficient showing to support a reasonable belief that jury misconduct occurred. . . ." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552.)⁶

C. *Soper failed to establish good cause for disclosure of the jurors' personal identifying information*

Soper's attempt to establish good cause for disclosure of the jurors' personal identifying information was deficient in several respects. Soper's application was procedurally flawed, the hearsay statements contained in the newspaper article on which the application was based were ambiguous, and the article contained no evidence that would support a good faith belief that jury misconduct had occurred.

With respect to procedural irregularities, defense counsel did not sign her declaration under penalty of perjury, as is required. (See Code of Civ. Proc. §§ 237, subd. (b) [requiring a "declaration" showing good cause for disclosure], 2015 [specifying attestation requirements for all declarations].) Further, in the declaration, counsel inaccurately stated that the foreman of the jury had been "quoted" in the newspaper article on which the application was primarily based. The newspaper article was not attached to the application as an exhibit, nor did the application even quote from the article. The trial court would have been justified in denying the application based on these deficiencies, alone.

⁶ "Even though *Rhodes* was decided before [section 237's] present enactment requiring a showing of good cause, the *Rhodes* test survived the amendments." (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 990.)

In addition, the article itself was open to various interpretations. The article did not contain any direct quotations, but rather, contained an apparent paraphrasing of postverdict comments purportedly made by the jury foreman, who declined to give the reporter his name. Further, while the article asserted that the foreman had stated that the jury settled on second degree murder with respect to the Olson killing because there was "less physical evidence" as to that killing, the article provides no additional detail as to the meaning of this statement.

We reject Soper's suggestion that the only explanation for the foreman's paraphrased statement is misconduct on the part of the jury. The single sentence is vague and is subject to various interpretations. Moreover, even assuming that the statement suggests that some jurors may have misunderstood or misapplied the law, this does not constitute evidence of juror misconduct.⁷ (See *People v. Steele* (2002) 27 Cal.4th 1230, 1264.)

The article does not contain any evidence, much less evidence sufficient to support a good cause showing, of the types of jury misconduct that Soper refers to in his brief, such as an overt agreement among the jurors to render a compromise verdict, rubber-stamp a verdict, or ignore the court's instructions. While Soper quotes *People v. Perez* (1992) 4 Cal.App.4th 893, 908, for the proposition that, "evidence of a jury's explicit or

⁷ One possible reading of the article is that the jury misapplied the law in a manner favorable to Soper. That is to say, it is possible to read the article as suggesting that the jury would have found Soper guilty of the first degree murder of Olson, but because the jury compared the evidence presented as to the Olson killing with that presented as to the Rigby killing, the jurors believed that the evidence fell short of the evidence required to convict Soper of first degree murder of Olson.

implicit agreement to violate a court's instruction does not touch upon the juror[s'] subjective reasoning processes," the newspaper article does not suggest the existence of such an agreement. (See also *People v. Wilson* (1996) 43 Cal.App.4th 839, 852 [defense counsel failed to demonstrate good cause for disclosure of juror information where counsel "did not explain his speculative account of how the jurors may have reasoned about the case constituted juror misconduct"].)

We conclude that the trial court did not abuse its discretion in finding that Soper failed to establish a good faith basis for disclosure of the jurors' personal identifying information.

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.